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9

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

12 ENOCH ADAMS, JR., LEROY ADAMS,
13 ANDREW KOENIG, JERRY NORTON
DAVID SWAN and JOSEPH SWAN,

14 Plaintiffs,

15 v.

16 TECK COMINCO ALASKA INCORPORATED

17 Defendant.

18
19 NANA REGIONAL CORPORATION and
NORTHWEST ARCTIC BOROUGH,

20 Intervenors-Defendants.

21 Case No. A04-49 (JWS)

22 **PLAINTIFFS' OPPOSITION**
TO MOTION TO STRIKE
PLAINTIFFS' REPLIES
[DOCKET 252]

1 **I. INTRODUCTION**

2 At Docket 252, Teck Cominco, NANA and the Northwest Arctic Borough
 3 (“Defendants”) jointly ask the Court to strike Plaintiffs’ reply briefs at Dockets 246 and 248, or
 4 allow them to file replies in support of their objections to Plaintiffs’ exhibits. The Defendants
 5 make the motion based on the sole argument that they did not understand the Court’s Scheduling
 6 Order to include the possibility of reply briefs. Motion at 2-3. The Defendants cannot muster a
 7 citation to a single case, statute or local rule which supports their argument. On the other hand,
 8 the Federal Rules of Civil Procedure, the District Court’s Local Rules, and this Court’s own pre-
 9 trial Orders in this case all support Adams here. The Motion has no merit and Adams
 10 respectfully requests that it be denied.

11 **II. ADAMS FILED MOTIONS *IN LIMINE*, AND THUS IS ENTITLED TO FILE
 12 REPLY BRIEFS.**

13 Under the local rules, if a party files a motion, it is entitled to exercise its option of filing
 14 a reply brief in support of that motion. D.Ak.L.R. 7.1(b). Here, Adams filed two motions *in*
 15 *limine* under Federal Rule of Civil Procedure (“F.R.C.P.”) 37 with regard to Defendants’
 16 exhibits, in addition to the standard exhibit objections it filed. First, it filed a motion to exclude
 17 four of the Northwest Arctic Borough’s proposed trial exhibits because the Borough had never
 18 disclosed those exhibits, in violation of F.R.C.P. 26’s disclosure requirements. Docket 220.
 19 Under Rule 37, this was Adams’s appropriate recourse when the Borough completely failed to
 20 comply with Rule 26.

21 Adams’s second motion *in limine* to exclude exhibits was directed at Teck Cominco’s
 22 egregious violation of Rule 26 and this Court’s pre-trial disclosure Order of August 9, 2007.
 23 Under Rule 26 (and Adams’s discovery requests), Teck Cominco was obligated to disclose “a
 24 copy – or a description by category and location – of all documents, electronically stored
 25 information, and tangible things that the disclosing party has in its possession, custody, or control
 26 and may use to support its claims or defenses, unless the use would be solely for
 27 impeachment[.]” Fed.R.Civ.P. 26(a)(1)(A)(ii). This obligation accrued in June 2004. Under the
 28 August 9, 2007 pre-trial Order, the Court required an updating of those initial disclosures: Teck

1 Cominco was required to “provide copies of all available monitoring reports, lab reports or other
 2 reports of the sort previously relied on in this litigation” to counsel for Adams by August 31,
 3 2007. Docket 167 at 1. However, Teck Cominco withheld almost 15,000 pages from plaintiffs
 4 (roughly 25% of all disclosures in this entire case and the KRPC case combined) until long after
 5 the Court’s August 31, 2007 deadline. On November 15, 2007, ten weeks after the disclosure
 6 deadline, Teck Cominco submitted Supplemental Disclosures of 7,200 pages of laboratory
 7 reports. *See* Docket 208. On January 4, 2008, Teck Cominco provided 4,700 additional
 8 laboratory reports and updated financial statements. While the withholding of these 12,000
 9 pages of documents severely prejudiced Adams in its preparation of expert reports, due January
 10 18, Adams did not seek to challenge most of these documents in its motion *in limine*: that motion
 11 was reserved for the thousands of *additional* pages of documents that Teck Cominco disclosed
 12 after January 15, 2008, many for the first time in providing its trial exhibits to Adams on January
 13 23. Again, Adams had no recourse in the face of the flagrant discovery abuse and violation of
 14 Rule 26 – including withholding lab reports from as far back as 2000 that Teck Cominco now
 15 disclosed and wanted to use at trial – but to file a motion *in limine* under Rule 37. Docket 208.

16 Having filed these two motions *in limine*, Adams was entitled to file a replies to the
 17 Borough and Teck Cominco’s responses. D.Ak.L.R. 7.1(b). The motions *in limine* and the
 18 replies were both appropriate and anticipated under the Court’s pre-trial orders. The Court’s
 19 August 9, 2007 pre-trial Order noted that “The order which sets the trial date will include time
 20 for the filing of motions *in limine*.” Docket 167 at 2. The Court’s August 31, 2007 pre-trial
 21 Order further noted, “The schedule for trial briefs, motions *in limine*, etc., will be set as if the
 22 trial were starting much sooner than it actually is. This is being done in order to be sure that
 23 there is ample time for briefing and resolving all motions *in limine* that may be filed.... No party
 24 should expect to be routinely granted an extension of time for the filing of a response *or a reply*
 25 in connection with any motion *in limine* that may be filed.” Docket 169 at 1 (emphasis added).

26 Adams understood and abided by the Court’s compressed briefing schedule for responses
 27
 28

1 to objections and motions *in limine*.¹ Where the Court was silent on the reply date for motions in
 2 limine regarding exhibits, Adams turned to the Local Rules. Local Rule 7.1(e) indicates that the
 3 time for filing a reply is five days. Because under Fed.R.Civ.P. 6(a)(2), weekends are not
 4 counted if the period is less than 11 days, Adams timely filed its reply to Teck Cominco's
 5 opposition [Docket 246] on February 12, 2008, five court days after the Opposition was filed on
 6 February 5, 2008. Adams timely filed its reply to the Borough's Opposition [Docket 248] on
 7 February 13, 2008, four court days after the Borough's Opposition was filed on February 8, 2008.
 8 Adams has abided by every Court rule and Order and met every deadline. Defendants now seek
 9 to penalize Adams by striking its reply briefs. Defendants' argument has no merit.²

10 Filing motions *in limine* is not "litigation gamesmanship," as Defendants' imply. Motion
 11 at 3 n.12. Filing motions *in limine* is litigation. Withholding documents for years after discovery
 12 deadlines, and for months after Court orders to disclose them, and then moving to strike briefs
 13 seeking to exclude those documents – that is litigation gamesmanship. Adams respectfully
 14 requests that this further abuse by Defendants not be allowed, and that the motion to strike
 15 Adams's reply briefs be denied.

16 **III. DEFENDANTS DID NOT FILE MOTIONS AND THUS ARE NOT ENTITLED
 17 TO REPLIES.**

18 Defendants' alternative argument is similarly specious: they request the opportunity file
 19 reply briefs although they never filed any motions. Defendants' counsel, capable lawyers all,
 20 chose not to file motions *in limine* with respect to Adams's exhibits (although they did file a
 21 motion with respect to Adams's expert reports, Docket 218). That was a tactical decision
 22 counsel made, and one with which they now must live. Adams likewise did not file a reply to the
 23

24 ¹See, e.g., Dockets 208, 210, 211, 215, 220, 221, 224, 225, 227, 233, 235, 246 and 248,
 25 all timely filed motions, oppositions or replies.

26 ²Defendants' argue that the "parties", including the Plaintiffs', understanding that no reply
 27 briefs would be filed regarding the admissibility of exhibits is demonstrated and bolstered by the
 28 parties' Joint Request for Scheduling Order." Motion at 2, referring to Docket 229. Nothing in
 Docket 229 supports this imputation of "Plaintiffs' understanding" as the document is silent on
 reply dates. Plaintiffs all along expected to file replies to their motions *in limine*.

1 Defendants' Response to Objection to Exhibits (Docket 236, responding to Docket 215, Adams's
 2 Objection to Exhibits), because it understood that no replies were allowed for straight objections
 3 that were not motions *in limine*. Adams is living by the same rules as the Defendants. Now that
 4 Defendants have made what they apparently consider a tactical error, they request a "do-over"
 5 from the Court. Once again, Teck Cominco seeks to avoid playing by the rules that everyone
 6 else is playing by.

7 No party got to reply to the responses to their standard exhibit objections: see Docket 215
 8 (Adams's "Objections to Final Exhibit List") and Docket 245 (Teck Cominco's response), with no
 9 reply; Docket 214 (Teck Cominco's objections to exhibits) and Docket 233 (Adams's response),
 10 with no reply; and Docket 217 (NANA's objections to exhibits) and Docket 235 (Adams's
 11 response), with no reply. While the two motions *in limine* under Rule 37 were also styled as
 12 "objections" as well as motions *in limine*, they sought to address gross discovery abuses by the
 13 Borough and Teck Cominco, not make the garden variety exhibit objections found in Docket 214
 14 (Teck Cominco), 215 (Adams) and 217 (NANA). Defendants, having acknowledged that the
 15 motions in question were in fact motions *in limine* in their own filings (e.g. Docket 229), cannot
 16 now plausibly feign surprise that Adams briefed them as motions *in limine*.

17 Because the Defendants did not file a motion with regard to the exhibits, they are not
 18 entitled to a reply. They have cited no rule, statute or case for the proposition that they are.
 19 Defendants' motion should be denied.

20 **IV. CONCLUSION**

21 Adams respectfully requests that the Court deny the Defendants' motion to strike, and the
 22 Defendants' alternative request to file reply briefs. Respectfully submitted this 28th day of
 23 February, 2008.

24 /S/ Luke Cole

25 Luke Cole
 26 Attorney for Plaintiffs

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 28th day of February 2008, a true and correct copy of the foregoing Opposition to Motion to Strike
Plaintiffs Replies was served, via electronic mail, on the below identified parties of record:

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